IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9143 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JASHAVANTRAY CHHAGANLAL VYAS - Petitioner(s)

Versus

NATIONAL TEXTILE CORP. LTD. & 3 - Respondent(s)

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Appearance :
MR JT TRIVEDI for Petitioner(s) : 1,
MR DG SHUKLA WITH MS.ASMITA PATEL FOR NANAVATI & NANAVATI for Respondent(s) : 1 - 4.
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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 13/10/2005

ORAL JUDGMENT

1. The petitioner, who was lastly working with Viramgam Textile Mills at Viramgam, a unit of National Textile Corporation (Gujarat) Ltd. (NTC), as Stores Officer, opted for Modified Voluntary Retirement Scheme (MVRS), which came to be introduced in November,2001, by filling

up requisite form on 21st March,2002. The said request of the petitioner came to be accepted by the respondent authorities with effect from 31st July,2002 and he was paid an amount of Rs.5,67,648.69 paise by way of his retiral benefits including gratuity, leave encashment, medical allowance etc. An amount of Rs.78,800/- came to be deducted by way of income-tax from the amount payable to the petitioner, which undisputedly is Rs.12,46,448.69 paise. An amount of Rs.6,00,000/- was not paid and withheld by the respondent authorities on account of alleged involvement of the petitioner in a criminal case for charges of offence punishable under Section 120-B, 120, 477-A of IPC and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act,1947 and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act,1947. As per the prosecution case, it is alleged that the petitioner along with several other persons, as Stores Officer, used to send sample after drawing the same from the material received from the party, for testing and comparison by the Laboratory situated in the premises of Jahangir Textile Mills, Ahmedabad, headed by Dr.R.H.Alurkar. Ultimately, it was revealed during the investigation that the laboratory report showed that the consignment samples sent by Mill were not being manufactured by the said M/s.Colour Chem Ltd. Ultimate allegation against the petitioner is that

while he was at Petlad, about 450 kg. of colour was, thus, wrongly shown as having been used. The value of such colour comes to about Rs.38,115/- undisputedly. This acts were in or around year 1988.

1.1 The petitioner accepted the said amount of Rs.5,67,648.69 paise towards his dues of MVRS under protest, as can be seen from Annexure-A. He made a representation to the Chairman of National Textile Corporation, Managing Director, General Manager, Viramgam Textile Mill on 5.8.2002 against the said deduction of Rs.6,00,000/-. The said representation has not been paid any heed to nor has it been replied to. The petitioner, therefore, preferred this petition on 12th September,2002 making following reliefs :

(a) to allow this petition and issue a writ of mandamus or any other appropriate writ, direction or order in the nature of writ, directing the respondents to release the amount of Rs.6 lacs with interest from 1.8.2002 until payment thereof at the rate of 15% per annum, forthwith;

(b) to grant appropriate interim relief directing the respondents to release Rs.6 lacs, pending admission, hearing and final disposal of

the present petition.

(c) to grant such further and other reliefs, as may be deemed to be just and proper.

2. Learned Advocate Mr.Trivedi has raised following contentions during the course of his arguments :

(i)The petitioner is not facing any departmental proceedings nor any departmental proceedings has ever been initiated against him for the alleged act.

(ii)Against value of Rs.38,115/- of the goods in question, an amount of Rs.6,00,000/- has been withheld considering interest payable thereon @ 14% from 1988.

(iii)He submitted that other similarly situated persons have either been paid full amount or the actual value of the goods in question has been withheld. He has given an example of Mr.S.N.Khemka, Mr.B.M.Vyas and Mr.Nalin P. Gandhi and lastly Mr.P.R.Shah. He,therefore, submitted that unequal treatment is given, even amongst similarly situated persons.

(iv)Mr.Trivedi submitted that the supplier has been paid all his dues.

(v)Mr.Trivedi also submitted that the respondent authorities have founded their defence on incorrect facts.

(a) Mr.Trivedi has drawn attention of this Court to the averment in affidavit-in-reply where it is contended that the petitioner has been convicted, as against the fact that trial has not even began.

(b) Mr.Trivedi has also drawn attention of this Court to the averment in affidavit-in-reply that the petitioner accepted the amount without any objection, as against a specific objection raised while accepting the amount as can bee seen from Annexure-A.

(c) Mr.Trivedi also drawn attention of this Court to an averment in affidavit-in-reply to the effect that the petitioner has confessed and admitted the loss attributable to him would of about 450 kg.; whereas, in fact, in petition the petitioner has not so admitted but, only it is averred that even if it is assumed, it would be that much quantity.

(vi)Mr.Trivedi submitted further that the petitioner has no objection, if an amount of Rs.45,000/-, as against Rs.38,115/-, is permitted to be withheld by the respondents till the trial against the

petitioner is concluded.

(vii)It is contended that MVR Scheme, if seen, it does not contemplate withholding of such amount. It was open for the respondent authorities to refuse the permission to the petitioner when he opted for the MVRS. But, once it is accepted, it was not open for the respondents to withhold the amount. He has drawn attention of this Court to Clause 1.6 of the said MVRS. He submitted that the decision to withhold the said amount of Rs.6,00,000/- was not taken by the Board of Directors, though it is subsequently claimed to have been ratified.

(viii)Mr.Trivedi submitted that the defence of the respondents that the Mill is sick unit and, therefore, unless permission is obtained from BIFR, this proceeding would be hit by Section 22 of the SICA, is not legally tenable. He has relied on several decisions in support of his case.

2.1 Mr. Trivedi, therefore, submitted that the petition may be allowed.

3. Learned Advocate Mr.Shukla for the respondents has mainly canvassed that unless permission from Board of

Industrial & Financial Reconstruction (BIFR) is obtained, the proceedings would be hit by Section 22 of the Sick Industrial Companies (Special Provisions) Act,1985 (SICA).

3.1 It is also contended by Mr.Shukla that the decision to withhold the amount is based on the National Textile Corporation (Gujarat) Ltd. Gratuity Rules effective from 1st January,1991, particularly provisions contained in Rule-3 thereof. He submitted that though no disciplinary action is taken, the Rule also contemplates 'proceedings' and 'proceedings' would include criminal prosecution. He, therefore, submitted that the petition is not entertainable.

3.2 Mr.Shukla submitted that the amount of interest is calculated because loss is caused to the Institution because of the petitioner. He, however, had to concede that in case of a similarly situated persons where worth of the goods was nearly Rs.6,00,090/-, only an amount of Rs.6,10,000/- has been withheld. He also submitted that uniform amount was taken into consideration for being withheld and it was not aimed at any discriminatory treatment. He submitted that in that case of Mr.P.R.Shah, the time-lag is different. Mr.Shukla has also relied on several decisions in support of his case that this

petition would be hit by Section 22 of the SICA.

3.3 Mr.Shukla has submitted that it is true that initial decision to withhold Rs.6,00,000/- from the amount payable to the petitioner, was not taken by Board of Directors but, was subsequently ratified by a Resolution passed in a meeting of 27th August,2002 and would, therefore, attain same force and sanction, as if it is a decision of the Board. Mr.Shukla, therefore, submitted that the petition may be dismissed.

4. This Court has taken into consideration rival side contentions in light of the facts of the case and various decisions relied upon by learned Advocates.

5. Now, if the facts of the present case are examined, the petitioner is facing prosecution for some irregularity involving an amount of Rs.38,115/- allegedly committed from the period between 1985 and 1987. The petitioner thereafter has been given promotion and benefit of revision of pay scale. No departmental proceedings are initiated and they are even claimed to be under contemplation. In the prosecution, only charge sheet is filed and trial has yet not commenced.

6. The reliance placed on the National Textile

Corporation (Gujarat) Limited Gratuity Rules can well be referred to. Relevant portion of Rule-3, which is heavily relied upon, runs as under :

Rule-3 - Applicability

(1) xxx xxx xxx
(2) xxx xxx xxx
(3) xxx xxx xxx
(4) xxx xxx xxx
(5) xxx xxx xxx
(6) xxx xxx xxx

An employee against whom disciplinary action / proceedings is contemplated or pending at the time of resignation / retirement etc. will not be paid gratuity unless the action / proceedings against him have been finalized. On finalization of the disciplinary proceedings, the release of payment of amount of gratuity will depend on the final outcome of the disciplinary proceedings and keeping in view the orders of the disciplinary authority. Gratuity will not be admissible to an employee whose services are terminated for misconduct, insolvency or inefficiency.

7. It is canvassed that an employee against whom disciplinary action / proceeding is contemplated or pending at the time of resignation or retirement etc.,

will not be paid gratuity unless the action / proceeding against him have been finalized. It is, therefore, canvassed that term 'proceeding' would include criminal prosecution as well. It is not possible to accept this contention because in the later part of this very provision, it is provided that on finalization of disciplinary proceedings, the release of payment of amount of gratuity will depend on final out come of the disciplinary proceedings and keeping in view the orders of disciplinary authority. Therefore, it is not possible to read disciplinary action and proceedings distinctly. What is contemplated is 'disciplinary action' or 'disciplinary proceedings' rather than 'disciplinary action' or 'proceedings'. Therefore, the respondent cannot take shelter of this provision and claim that the amount has been withheld in exercise of powers under this provision.

8. Similarly, if the MVRS Scheme is seen, Rule 1.6 contemplates that management reserves the right to refuse an MVRS application without assigning reasons. It also provides that applications for MVRS in respect of Clause 1.6.1 and 1.6.2 may be put up before Board of Director for consideration. Clause 1.6.2 provides that, where prosecution in a Criminal Court is contemplated or may have already been launched in any Court of Law. The

present case would fall in this category. It appears that the decision whether to accept or to refuse the MVRS application of the petitioner was not taken by the Board of Directors before it was communicated to the petitioner. The decision, therefore, cannot be said to of Board of Directors. However, an attempt is made to crease out the difficulty by a subsequent Resolution of Board of Directors in a meeting held on 27th August,2002, where it is said that the decision is approved and ratified by the Board of Directors. It is, however, nowhere emerging as to under what powers and by whose authority and under which provisions, the said three Directors took a decision to withhold an amount of Rs.6,00,000/- and acted upon it. The MVRS does not contemplate any partial acceptance or conditional acceptance of MVRS application. All that is contemplated under Rule 1.6 of MVRS, is that management has a right to refuse MVRS and that such applications are to be placed before Board of Directors for consideration. When it comes to consideration it has to be as envisaged in MVRS and the consideration would be limited to question whether to grant or to refuse MVRS. Under the circumstances, the action on part of respondent authorities of withholding Rs.6,00,000/- while granting benefit of MVRS does not appear to have any sanction of the Scheme or Rules.

9. It is also worth a note that, for the alleged action during the period of 1985 to 1987, the action is taken in the year 2002 only when the petitioner applies for benefit of MVRS and till then, no action in form of departmental proceedings is taken or initiated or even contemplated. The amount involved, admittedly, is Rs.38,115/-. As against that, amount of Rs.6,00,000/- is withheld for interest, which by no stretch of imagination, can be said to be reasonable or justified in absence of any departmental proceedings or decision thereon.

9.1 As if not enough, the action taken by the respondents in respect of similarly situated persons is also not uniform. It is not in dispute that in case of Mr.P.R.Shah, an amount of Rs.6,10,000/- has been withheld, where his involvement is to the extent of Rs.6,00,099.50 paise with a quantity of 7805 kg. of colour as against 450 kg. of colour in case of the petitioner. It is also indicated that in case of Mr.B.M.Vyas, approximately Rs.1,00,000/- has been withheld, as against a quantity of 2115 kg. of colour. However, in additional affidavit to the affidavit-in-reply dated 10th November,2003, the respondent authorities have said that Mr.B.M.Vyas has not been paid any retiral benefits. Likewise, in case of Mr.P.R.Shah, it is also

indicated that he is relieved from service but, no dues under MVRS are paid to him. There is no other contemporaneous material available to support the case of either side. It is a case of word against word. This Court, therefore, would not like to go into the arena of such disputed question of fact and examine the contention of petitioner alleging discriminatory treatment.

10. The question that this Court is now required to examine is, whether this petition can be entertained or not in light of provisions contained in Section 22 of the SICA. In order that same can be properly dealt with, the said provision requires to be quoted :

> **“Suspension of legal proceedings, contracts etc.**
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> **22.(1)** Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act,1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of

> the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority".

10.1 It is not in dispute that respondent Nos.2, 3 and 4 viz. National Textile Corporation (Gujarat) Ltd. (NTC) has been declared as a sick unit under the SICA. Now, therefore, if the provision under Section 22 of the said Act is seen, no proceeding for winding up or for execution, distress or the like against any of the property of the Industrial Company, no suit for recovery of money or for an enforcement of any security against the Industrial Company, would lie, except with consent of BIFR or as the case may be, the Appellate Authority. The question, therefore, would be whether, the present petitioner's case would be covered by this provision or not. In this regard, it would be appropriate to refer to an unreported decision of this Court in the case of

Dakshin Gujarat General Labour Association Vs. State of Gujarat in Special Civil Application No.8351 of 1999 rendered on 26th October,1999. In that petition, the petitioner sought direction against the respondent that effecting recoveries of dues of workmen and prosecuting the management of the respondent for non-implementation of the labour laws in the past and till the date of order. A coordinate Bench of this Court observed that the case would be covered under Section 22 of the SICA and, therefore, he himself approached BIFR for seeking appropriate directions in respect of the grievances made therein.

10.2 The said order was carried in appeal by preferring Letters Patent Appeal No.1603 of 1999 and a Division Bench of this Hon'ble Court by order dated 30th December,1999 confirmed the same. In that case, of course, the applications were pending before the Board and, therefore, directions were issued to decide the same expeditiously.

10.3 In the case of Tata Davy Ltd. Vs. State of Orrisa and Ors, (1997) 6 SCC 669, it is held that once a company is declared as a sick unit within the meaning of SICA, proceedings for recovery of sales tax dues by the State Government cannot be continued without Board's

consent.

10.4 In the case of U.P.Financial Corporation and Ors. Vs. Naini Oxygen & Acetylene Gas Ltd., (1995) 2 SCC 754, a view was expressed by their Lordships that in commercial matters, decision of the body authorized to decide, should not normally be interfered with by Court.

10.5 In the case of Bavji Vira Solanki Vs. Rajkot Spg. & Wvg. Mill, 2003 (3) GLH 179, a coordinate Bench of this Court while considering the scope of Section 22 of SICA observed that, in view of the pendency of proceedings under SICA, petition would not lie nor can it be proceeded with, as the company is registered as a Sick unit and a case is pending before BIFR.

10.6 In the case of Morarji Desai Textile Labour Co-operative Industries Ltd. Vs. Thakorebhai Dhulabhai Patel,2003-II LLJ 129, a coordinate Bench of this Court also examined the issue and took a view that where there is monetary implication involved in the proceedings or any other proceedings of such nature, they cannot be prosecuted unless necessary consent as required under sub-section (1) of Section 22 of the Act is obtained. The prosecution of such proceedings without requisite consent from BIFR ceases to have any legal effect. This

view was expressed while examining a question on payment of back-wages of an employee.

10.7 The above decisions have been relied upon by learned Advocate Mr.Shukla to support his contentions about maintainability.

11. To counter these contentions, learned Advocate Mr.Trivedi has relied upon following decisions :

(1) In the case of Rajnagar Textile Mills No.1 Vs. Textile Labour Association, 1998 (2) GCD 1704 (Guj.) where a view was taken that embargo under Section 22 does not apply where the case relates to wages. The decision was rendered in view of the fact that the pre-requisites or condition precedents set out in Section 22 (1) are totally wanting in the facts of that case and there was no question of defeating claim with regard to the wages and work on the basis of the provisions of Section 22. A view was taken that, despite the wide import of the word 'proceeding' as have been given by the Supreme Court in the judgment delivered in Maharashtra Tubes Limited, the impugned orders passed by the Labour Court in that case and Industrial Court with regard to the due wages and the work with reference to agreement could not have been set aside so as to defeat

the claim of the respondent.

(2) In the case of Parmeshwar Narayan V/s. Collector, Ahmedabad and Anr.,2000 (1) GLR 521 relied upon by Mr.Trivedi, a similar view is taken that wages of workman cannot be defeated by having recourse to Section 22 of the Sick Industrial Companies Act. However, it is indicated by learned Advocate Mr.Shukla that this order was challenged by preferring LPA No.1238 of 1999 which came to be decided on 27th October,1999 considering the observations made by learned Single Judge in Para.9 of the said judgment. Para.9 of the said judgment of the learned Single Judge runs as under :

Para.9

"Having gone through the proceedings recorded by the Bench of BIFR, it is clear that the bench of BIFR, while considering the representation made on behalf of the Company as well as the Employees' Union, in para 14, has stated in no uncertain terms that it was not restraining or staying the payment of workers dues and the directions given by the High Court have to be honoured. May be such directions may have been given in pursuance of the dispute against the respondent No.2 by the workers of its other units. However, the fact remains that the Bench

of BIFR has clarified that it was not restraining or staying the payment of workers dues and that it is not open for the respondent No.2 to take shelter of Section 22 of the SICA".

It is, thus, clear that the judgment was rendered in peculiar facts of the case, where the BIFR had not restrained or stayed the payments of the workers' due and, therefore, it was not open for the employer to take shelter under Section 22 of SICA.

11.1 Learned Advocate Mr.Trivedi has also relied on decision in the case of Bhailal Kalidas Barot Vs. Factory Manager, Jehangir Textile Mills Ltd. & Ors., 2003 (1) GLR 629, where also protection under Section 22 of SICA was not permitted to the employer against the dues of an ex-employee, which were withheld by the employer on account of unauthorized retention of premises by the employee. In that case, the amount of gratuity due to the petitioner were withheld.

12. What emerges from the impugned order as well as affidavit-in-reply is that entitlement of the petitioner is not in dispute. In fact, the amount is determined, identified and retained as a deposit by the respondents. Differently put, the amount is already earmarked and

kept aside. Only the payment has been withheld.

13. Under the circumstances, in the opinion of this Court, when the entitlement of the petitioner is already crystallized and entitlement is accepted, but withheld only on ground of the said prosecution, it cannot be said that the case would be governed by Section 22 of the SICA. The question that is required to be examined is only whether, in facts of the case, the amount could have been withheld or not.

14. What emerges is that for the alleged act between 1985 and 1987 involving Rs.38,115/-, an amount of Rs.6,00,000/- is sought to be withheld, in absence of any departmental proceedings against the petitioner and there is no finding of his involvement or guilt on that front. As on today, there is no finding of his guilt on the criminal prosecution front either and a period of about 17 years has lapsed. During the period between 1988 and 2002, the petitioner has been given benefit of promotion as asserted by him and not controverted by the other side. The MVRS or the NTC's Gratuity Rules also do not contemplate withholding of such amount. Under the circumstances, withholding of Rs.6,00,000/- is not legal or just or proper.

15. The petitioner has volunteered that he has no objection, if the respondents are permitted to withhold an amount of Rs.45,000/-, which would take care of interest of the respondents as well.

16. This Court finds that there is no legal justification for withholding of Rs.6,00,000/-, payable to the petitioner as retiral benefits. The amount is withheld and retained as a deposit by the respondent authorities. The petition therefore, deserves to be allowed and the same is allowed. However, in light of volition shown by the petitioner, an amount of Rs.45,000/- is permitted to be withheld by the respondent authorities till finalization of the criminal prosecution. The rest of the amount i.e. Rs.5,55,000/- payable to the petitioner and not paid uptil now shall be paid to the petitioner by the respondent authorities at the earliest, preferably within four weeks from receipt of writ of this order. Rule made absolute. No costs. Direct service is permitted.

(A.L.DAVE,J.)

(vipul)